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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 16 2010

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering software consulting company. It seeks to employ the beneficiary permanently in the United States as an electrical systems engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2003 priority date of the visa petition and during the 2004 tax year. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 17, 2003. The proffered wage as stated on the Form ETA 750 is $75,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 2000. On the petition, the petitioner claimed to have an establishment date in March 1987, a gross annual income of $600,000, a net income of $504,000 and four employees.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and during tax year 2004, on August 15, 2007, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide a copy of its federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage during the priority year 2003. The director also requested the beneficiary's W-2 Forms for any applicable tax years. He also noted that if the petitioner had paid wages to the beneficiary during this period of time, the petitioner needed to submit evidence that it could pay the difference between the beneficiary's actual wages and the proffered wages.

In response, the petitioner, through former counsel, submitted the beneficiary's W-2 Forms for tax years 2003 to 2006;[2] copies of the beneficiary's 2007 pay stubs through August 30, 2007; correspondence from the IRS and the state of New Jersey with regard to the petitioner's incorporation as an S Corporation as of April 30, 2003; and the petitioner's Internal Revenue Service (IRS) Form 1120S for tax years 2003 through 2006. The petitioner also submitted a FleetOne monthly statement for July and September 2003 that lists balances for a personal interest checking, personal passbook saving and for two certificates of deposit with total account balances of $61,719.80 and $59,263.58, respectively.

The petitioner also submitted copies of its Invoice Summary for the year 2003 showing an outstanding invoice total of $6,737.84, and documentation on the petitioner's home equity line of credit identified as $311,800. Former counsel noted that in tax year 2004 a combination of wages paid, taxable income and the petitioner's assets exceeded the proffered wage of $75,000, and that in tax year 2003, the petitioner had just started its operation as a sole proprietorship owned solely by Mr. [redacted] Former counsel stated that the petitioner was converted into a corporation on or about April 30, 2003 and that the petitioner's owner proceeded to opt for S Corporation classification in August 2003. Former counsel states that for the third of the 2003 tax year in which the petitioner operated as a sole proprietorship, both Mr. [redacted] available cash of $59,000, and his

[2] The beneficiary's W-2 Forms indicate he received the following wages: $20,900 in 2003 from the petitioner identified as [redacted] Employer Identification Number [redacted]; $29,460 in 2004 from the petitioner identified as [redacted] $43,930 in 2005 from Xenon of NJ, Inc.; and $100,179 in 2006 from [redacted] of NJ, Inc. As of August 31, 2007, the petitioner had paid the beneficiary $45,054 in wages.

approved home equity line of credit established the petitioner's ability to pay the proffered wage. Counsel also noted that just the combination of the available cash and the beneficiary's wages paid in 2003 was sufficient to establish the petitioner's ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2003 priority date, and during tax year 2004, and, on November 28, 2007, denied the petition. The director did determine that the petitioner established its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2005 based on the petitioner's net income and that in tax year 2006, the petitioner paid the beneficiary a wage greater than the proffered wage of $75,000, and thus established its ability to pay the proffered wage in tax year 2006.

With regard to the evidence of incorporation on April 30, 2003, the director stated that the petitioner could be allowed to use his personal assets to establish the ability to pay for the period March 17, 2003 to April 30, 2003, (the period of time between the priority date and the established incorporation date). The director appears to state that the evidence of the sole proprietor's personal assets were not sufficient to establish the petitioner's ability to pay the proffered wage for the rest of the tax year. He further noted that the evidence with regard to the sole proprietor's assets and the home equity line of credit were not for the period of time the petitioner operated as a sole proprietor.

On appeal, current counsel asserts that the petitioner was a sole proprietorship for part of the 2003 priority year and that based on his personal assets, he could have established his ability to pay the proffered wage in 2003. The petitioner submits a lengthy list of exhibits. The AAO will briefly list the pertinent exhibits that have not been previously submitted to the record.

> Exhibit D. SS-4 Application for Employer Identification Number, for the incorporation of a corporation identified as [redacted] of NJ, trade name of [redacted] The type of corporation is identified as For Profit 1120, and Line 9 states that the reasons for applying was to change the type of organization from sole proprietor to corporation. Line 17s indicates that the business applying for Corporation status had applied before for an EIN utilizing a legal name of Kumaresh Sen with a trade name of [redacted]. This document is neither signed nor dated. The document is accompanied by correspondence from the State of New Jersey, Department of the Treasury, dated June 27, 2003 stating that the petitioner's application for S Corporation election had been accepted. The IRS correspondence dated August 11, 2003 states the petitioner's election to S corporation was accepted with an accounting period of December beginning April 30, 2003;
>
> Exhibit H. Form 1096 Annual Summary and Transmittal of U.S. Information Returns, for tax year 2000. The forms being filed with this Form are Forms 1099-MISC, and the filer's name is [redacted]. The actual 1099-Misc forms are not found in the record.

Exhibit I. The beneficiary's Form 1040 A for tax year 2003 filed as married filing jointly, with a document stamped December 31, 2007 by the IRS, Edison, New Jersey office. The Form 1040 and the IRS information indicate wages and salary of $30,975 for tax year 2003. The beneficiary's Form 1040 contains a page that breaks down these wages as follows: $20,900, [redacted], and $10,075, [redacted] of [redacted]. The beneficiary's W-2 Form for 2003 filed by [redacted] is also included indicating wages, and other compensation of $20,900. Employee Details documents dated August 11, 2003 and December 24, 2003 are also included in the exhibit. These two documents indicate that the petitioner paid wages to eight to eleven employees in the last two quarters of 2003. The beneficiary is listed on these documents. This exhibit also includes a pay statement form from [redacted] dated December 23, 2003 that indicates the beneficiary's year to date wages of $10,075;

Exhibit J. The petitioner's owner's Form 1040 IRS Tax Return Transcript for tax year 2003. This document indicated an adjusted gross income of $6,797; Schedule C business income of $11,688; and gross receipts or sales of $872,450, with wages of $241,264;

Exhibit K. Copies of the petitioner's[3] small business checking account statements for tax year 2003;

Exhibit L. Copies of the petitioner's (identified as [redacted] small business checking account statements from July 2003 to December 2003. (Exhibit T contains copies of the petitioner's (Identified as [redacted]) small business bank statements for tax year 2004, while Exhibit W contains the same evidence for tax year 2005);

Exhibit M. A copy of the petitioner's owner's FleetOne Gold Statement for April 4, 2003 to May 5, 2003 that identifies the current balances of a personal interest checking account, a personal passbook Savings account and two Certificates of Deposits. These accounts have a combined balance of $58,670. The accounts are in the name of [redacted] (the petitioner's owner) and his spouse, [redacted];

Exhibit N. Copies of the petitioner's owner's FleetOne bank accounts for July 2003 and September 2003. The total combined deposit and CD accounts as of September 4, 2003 were $59,263.58;

Exhibit O. A list of six banks with which the petitioner had lines of credit that were opened during the period of time May 1, 1973 to August 1, 2003 accompanied by current statements of available credit;

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[3] Identified as [redacted] on the bank statements.

Exhibit P. Documents with regard to existing home equity lines of credit from Citibank. One document states the petitioner is approved for a $311,800 home equity line of credit;

Exhibit Q. Examples of six contracts or purchase orders between the petitioner and other companies for which the petitioner performs subconsultations. One purchase order is dated January 2, 2003. Another contract amends an earlier subconsultant agreement dated May 14, 2002;

Exhibit R. A document that lists outstanding Invoices and Payment Status for tax years 2003 that indicates outstanding accounts receivable of $101,462. (Exhibit U contains the same document for tax year 2004 that indicates outstanding accounts receivable of $62,440);

Exhibit S. Copies of the petitioner's invoices for primarily work either contracted or performed in 2003, with copies of checks for tax year 2004; [4] and

Exhibit V. Copies of bills sent by the petitioner with regard to its business purchase orders and contracts primarily for the 2004 tax year.

On appeal, with regard to tax year 2003, current counsel states that the director failed to consider that the petitioner was newly incorporated and would not have shown immediate growth and revenues during the initial year. Counsel notes that the petitioner has shown reasonable expectation of continued increases based on the amounts of outstanding accounts receivables for tax years 2003 and 2004. Counsel also states that the director erred in not considering the petitioner's owner's financial documents to establish the petitioner's ability to pay the proffered wage in 2003. Counsel states that the bank statements of the petitioner's owner for the period of May 2003 to July 2003 should have been accepted, and notes that the petitioner's owner was also pre-approved for a home equity line of credit

Counsel also notes that the director's stated difference between the beneficiary's actual wages and the proffered wage in tax year 2003 of $54,100 is incorrect because the labor certification was filed on March 17, 2003 and only the salary from March 17, 2003 to December 31, 2003, or $59,589 would need to be established. Counsel also notes that the beneficiary was paid a salary of $20,900 by [redacted] the former sole proprietor, in 2003, and that from July 2003 onward he was paid by [redacted]. Counsel states that a copy of the W-2 issued by [redacted] was not readily available; however, the petitioner submits the beneficiary's 2003 Form 1040 to establish that

[4] Counsel on appeal states that the petitioner recovered all of the listed accounts receivables for 2003 during tax year 2004, and that the petitioner's monthly banking account statements for 2004 reflect the payments of these outstanding invoices. Counsel also notes that the petitioner recovered any outstanding accounts receivables for 2004 in tax year 2005, and refers to Exhibits V and W for corroboration of this statement.

the beneficiary received wages of $30,975. Counsel states that the petitioner only needs to show its ability to pay the remaining amount of $28,614 in 2003.

With regard to tax year 2004, counsel states that the amount of outstanding accounts receivables for tax year 2004 was also recovered, as documented by the petitioner's 2005 bank statements and copies of checks and invoices for tax year 2004 submitted to the record on appeal. Counsel states that $62,240 is more than sufficient to pay the remaining difference of $13,630. Counsel also notes that the petitioner's monthly checking account balances from January to December 2004 were sufficient to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. Counsel provides a list of the 2004 checking account balances that range from $6,436 in October 2004 to $20,506 in December 2004. Counsel also notes that the petitioner's line of credit of $63,987.35 as of December 31, 2004 could have been utilized to pay the beneficiary's salary.[5]

Counsel's reliance on the balances in the petitioner's bank account during tax years 2003 and 2004 is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

On appeal, counsel requests that USCIS prorate the proffered wage in 2003 because the priority date is March 17, 2003. With regard to counsel's assertions, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. We also find that the director's decision to limit any consideration of the sole proprietorship's ability to pay the proffered wage to one month is too narrow in its scope.

Further, while USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. The petitioner has submitted a Form W-2 from [redacted] for wages received by the beneficiary prior to the incorporation of the petitioner as an S Corporation, and ostensibly prior to the March 17,

[5] In his decision, the director determined the petitioner did not have sufficient net income or net current assets to pay the difference between the beneficiary's actual wages and the proffered wage. The director combined the petitioner's 2004 net income of $31,910 with the beneficiary's actual wages of $29,460 to arrive at the figure of $61,370, or $13,630 less than the proffered wage of $75,000.

2003 priority date. The petitioner did not submit a Form W-2 for the beneficiary's wages paid to him by the S Corporation petitioner for the period of time April 30 to December 31. For purposes of these proceedings, the AAO considers that the petitioner has to establish its ability to pay the entire proffered wage for the priority year 2003.

On appeal, counsel also asserts that the petitioner may utilize its home equity lines of credit and/or pre-approval of a line of credit to establish its ability to pay the proffered wage. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

With regard to the petitioner's utilization of outstanding Accounts Receivables to establish its ability to pay the proffered wage, Schedule L on the Form 1120S, line 2a under Assets, is for trade notes and accounts receivables, with 2b designated for less allowance for bad debts. Line 16 under Liabilities and Shareholders' Equity is designated for Accounts payable. Neither the petitioner's accounts receivables nor accounts payable are identified on the petitioner's Schedule L, Form 1120S. These sums would have been included in the analysis of the petitioner's current assets and liabilities, as a part of the analysis of the petitioner's net current assets, as will be discussed below. The AAO would not analyze the petitioner's accounts receivables, as they are already considered within the analysis of the petitioner's net current assets.

On appeal, counsel states that the petitioner's status as a sole proprietor during part of the priority year should have been considered. The petitioner has submitted evidence that its business structure

changed during the 2003 priority date year. It also submitted evidence as to the beneficiary's wages received from the [redacted], the claimed sole proprietor in 2003, as well as the sole proprietor's Form 1040 for 2003 with accompanying Schedule C. Thus, the record contains some information as to the sole proprietor's ability to pay the proffered wage. Therefore the AAO will examine the sole proprietor's ability to pay the proffered wage as well as the ability of the S Corporation petitioner to pay the proffered wage during the 2003 tax year.

Since the petitioner's incorporation date as an S Corporation is April 30, 2003, the AAO will examine the petitioner's ability to pay the proffered wage as a sole proprietorship from January 1, 2003 to April 30, 2003, or for four months of employment, and then examine the petitioner's ability when restructured as an S Corporation to pay the beneficiary's wages from May 1 to December 31, 2003, or eight months of employment. For purposes of this analysis, the AAO will divide the proffered wage by 12 months. Thus, the petitioner has to establish its ability to pay $6,250 per month, or $25,000 from January 1 to April 30, 2003; and $50,000 from May 1, 2003 to December 31, 2003.

Although the beneficiary's 2003 Form 1040 tax return provides a breakdown of wages, including wages paid by [redacted], the beneficiary's tax return does not indicate whether the beneficiary was the sole wage earner, or who specifically earned the amount of wages and salaries indicated on page 1 of the Form 1040. Of more probative weight would be the 2003 W-2 form or Form 1099-Misc issued by [redacted] to the beneficiary during tax year 2003. The AAO acknowledges that the record contains employee records for the latter part of 2003 that indicate the beneficiary earned $10,075 in the last two quarters of 2003. For illustrative purposes only, the AAO will utilize this figure as the wages paid by the petitioner in the period of time in 2003 that it was incorporated as an S Corporation.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in tax years 2003 or 2004. As stated previously, the petitioner submitted a W-2 Form from the sole proprietor that indicates it paid the beneficiary $20,900. The petitioner claims on appeal that it paid the beneficiary $10,075 after restructuring as an S Corporation. As previously discussed, as an analytical structure, for the period of time that the petitioner was a sole proprietor, it has to establish it could pay one third of the proffered wage, or $25,000. For the period of time structured as an S Corporation, the petitioner had to establish it could pay two thirds of the proffered wage to the beneficiary, or $50,000.

The petitioner as a sole proprietor or as an S Corporation did not pay the beneficiary the proportional part of the proffered wage. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the projected salary for the first third of 2003, or $4,100,

and the difference between the beneficiary's actual wages and the projected proffered salary, or $40,925 during the latter two thirds of 2003, while structured as an S Corporation.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately $20,000 where the beneficiary's proposed salary was $6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports a family of three, including himself. From January 1, 2003 to April 29, 2003, the sole proprietorship's adjusted gross income of $6,797 could cover the remaining wages to be paid as a sole proprietor, namely $4,100. However, it is improbable that the sole proprietor could support himself and his family on $2,697, which is the sum remaining after paying the difference toward the wages earned a negative adjusted gross income. While the record does not contain an itemized list of annual household expenses for the sole proprietor, the AAO notes that the IRS transcript reflects that under Itemized Deductions the sole proprietor paid $6,839 in real estate taxes, and $3,819 in mortgage interests on an annual basis. Household expenses for the four months of 2003 that the petitioner was a sole proprietor would increase significantly the sole proprietor's annual household expenses. Thus, the sole proprietor could not pay his household expenses, even for the shorter four month period, and also pay the remaining proffered wage for these four months.

However, the record of proceeding contains bank statements from the petitioner's savings, personal checking accounts, and certificates of deposit for the April 2003, with a combined ending balance of $58,670. While the director is correct that the record does not contain evidence as to monies included in these accounts from January to March 2003, the amounts in these accounts remain stable. The petitioner's substantial cash assets as reflected in its saving, money market, personal checking and savings account shift this decision in the petitioner's favor for a specific period of time in 2003. The AAO views the petitioner's ability to pay the difference between the beneficiary's actual wages and his proffered (projected) salary of $25,000 during January to April 2003 to be reasonable.

For the period of time April 30, 2003 to December 31, 2003, the petitioner is structured as an S Corporation. As such the petitioner's interest checking accounts, savings accounts, and certificate of deposits are not available to establish the petitioner's ability to pay the remaining projected salary during the latter two thirds of the 2003 tax year. During this period of time, USCIS may not "pierce

the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

As stated previously, the petitioner as an S Corporation did not submit a Form W-2 to the record to establish any wages paid to the beneficiary, although the petitioner submitted some evidence that $10,075 had been paid to the beneficiary in 2003. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. In the instant matter, the petitioner's net income[6] in the period of time from April 30, 2003 to December 31, 2003, is -$10,658.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Those depreciable assets will not be converted to cash during the ordinary course of business and will not,

[6] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed May 25, 2010.) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional deductions shown on its Schedule K for 2003, the petitioner's net income is found on line 28, of its 2003 tax return.

therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets for the period of time April 30, 2003 to December 31, 2003 is -$8,686. Therefore, for the period of May through December 2003, the petitioner, structured as an S Corporation, did not have sufficient net current assets to pay the proffered wage.

Therefore, for the year 2003, while the petitioner as a sole proprietor established its ability to pay the difference between the beneficiary's actual wages and the proffered wage during January to April 2003, the petitioner, structured as an S Corporation, did not have sufficient net income or net current assets to pay the proffered wage during May to December 2003.

With regard to tax year 2004, as noted by the director, beneficiary received wages of $29,460. Thus, the petitioner had to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of $75,000, or $45,540 in tax year 2004, based on either its net income or its net current assets.

In 2004, the record reflects that the S corporation petitioner had net income of $31,910, and net current assets of $9,715. Thus, the petitioner did not have sufficient net income or net current assets in tax year 2004 to pay the difference between the beneficiary's actual wages and the proffered wage. The petitioner lacked $13,630 in net income in tax year 2004 to establish its ability based on its net income. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for January to April 2003, and tax years 2005, and 2006.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, on appeal, counsel states that because the petitioner was incorporated in 2003, its reasonable expectations of increased profit should be considered. The AAO notes that while the petitioner may have restructured itself in tax year 2003, on the I-140 petition, the petitioner indicated an establishment date of 1987. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." With regard to number of employees, the petitioner submitted Employee Detail reports that identified eight to eleven employees in 2003, whereas the petitioner indicated on its I-140 petition that it currently has four employees. The petitioner's Forms 1120S indicate most compensation is paid to subcontractors or sub consultants.

The petitioner's gross receipts vary, from $420,957 (reported on the Form 1120S for 2003) for 2003[8] $596,212 in 2004; $438,378 in 2005, and $687,275 in 2006. This range would suggest that the petitioner's gross receipts decreased significantly after tax year 2003, and have varied slightly since then. The record only reflects minimal officer compensation during the period of time in question. The record contains no further evidence as to the petitioner's reputation in its field. Thus, assessing

[8] If the sole proprietor's gross receipts reported on its 2003 Form 1040 are considered separate from the S Corporation's gross receipts for 2003, the petitioner had an additional $872,450 in gross receipts as indicated on Schedule C of the IRS Tax Transcript.

the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.
The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO finds that the petitioner has not established that the beneficiary possesses a foreign degree equivalent to a four year Bachelor's degree in electrical engineering or a related field.[9] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

The beneficiary possesses a foreign degree from Jadavpur University. Thus, the issues is whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

[9] The AAO does not question whether the beneficiary possesses the requisite five years of work experience in the proffered position or in the related occupation of electrical engineer.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees

> must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[10] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). While the record contains a diploma from Jadavpur University for the beneficiary, the record is not clear that this degree is for a four-year course of university-level studies. The record contains the following documentation with regard to the beneficiary's academic qualifications:

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[10] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

A copy of the beneficiary's diploma dated 1986 that indicates he received a Bachelor's of Electrical Engineering in 1986 from Javadpur University.

A Marks Statement for the beneficiary's final examination at the Jadavpur University taken in May/June 1984.

A document from the Malda Polytechnic, Malda, West Bengal that states the beneficiary passed the licentiate in Electrical Engineering held in December 1967.

A Marks Statement from the State Council for Engineering and Technology, West Bengal, listing the beneficiary's marks in an examination for the licentiate taken in December 1967.

A document from the University of Gaubati, dated 1963 entitled Matriculation Examination. This document states that the beneficiary in March 1963 passed the Matriculation Examination of the university and was placed in the Second Division.

Two documents from the Institution of Engineers India. The first is a document that states the beneficiary by virtue of his academic qualifications, professional training and experience and his corporate membership of the Institution has been registered by the council of the Institution and can use the title "Chartered Engineer (India)." This document is dated January 16, 1989. The following is noted at the bottom of this document- "This certificate is the property of the Council and must be returned on request. It is valid only for as long as the holder remains a corporate member of one division of the Institution." The second document states a diploma is granted to the beneficiary who was elected member of the Institution as of August 24, 1990.

The record also contains an evaluation report written by Mr. [redacted], The Trustforte Corporation, dated October 26, 1999. Mr. [redacted] states that the beneficiary entered the Jadavpur University in 1982, and completed his studies in 1986. Mr. [redacted] furthers notes that the beneficiary completed both general studies and specialized studies with entry-level courses in English, the social sciences, mathematics and the sciences, with later advanced level courses in electrical engineering, communication engineering, instrumentation, electronics, and computer science. Mr. [redacted] then noted that the beneficiary has the equivalent of a U.S. bachelor of science degree in electrical engineering.

However, the record contains only the evidence of the beneficiary's final examination taken in 1984, with no Marks Statements or transcripts for eight semesters or four years of university-level studies at Jadavpur University. There are no transcripts that mention classes in English, social studies, or related fields. Further, the dates of attendance identified by Mr. [redacted] (1982 to 1986) conflict with the dates provided by the beneficiary on the ETA Form 750, Part B. The beneficiary states that he attended Jadavpur University from August 1979 to July 1984. Mr. [redacted] notes that he

reviewed the beneficiary's original documents prior to writing his evaluation; however, these documents are not in the record.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The AAO gives less weight to Mr. [redacted] evaluation based on its discrepancies with the record. Thus, Mr. [redacted] evaluation is not sufficient to establish that the beneficiary has the equivalent of a four-year U.S. bachelor of engineering degree.

Based on the lack of evidence and the discrepancies in the record, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials. EDGE in its section on India states that a bachelor of engineering/technology is awarded upon completion of four years of tertiary education beyond the Higher Secondary Certificate or equivalent, and that the degree is equivalent to a U.S. baccalaureate degree. (Excerpts from the EDGE database and from PIER publications are enclosed with this decision.) However, in the instant matter, the record does not contain the beneficiary's transcripts for his claimed four years of university-level studies. The AAO also notes that the documents provided by the IEI appear to qualify as professional qualifications as a Chartered Engineer, rather than academic credentials. The AAO would thus question whether the beneficiary does possess the equivalent to a four-year U.S. baccalaureate degree in electrical engineering.

Because the petitioner has not established that the beneficiary does have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to

> determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or

otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education:	10 (Grade School) 2(High School) 4(College)
College Degree	Bachelor's *
Major Field of Study:	Electrical Engg/Related
Experience:	5 years in proffered job or five years as electrical engineer
Block 15:	* Or Equivalent

Must have 3+ years experience in project management, PLC Ladder programming for system automation, HVAC & Fire alarm system design, autocad, autolisp programming, primavera/MS projects.

Will accept master's with 2 years of experience in lieu of bachelor's and 5 years of experience.

Based on the record as presently constituted, the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.